OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6890

Thomas Fletcher Craig, Jr., Orrin T. Lankford,

Appellants,

v.

Sidney Barney, Commonwealth's Attorney, City of Petersburg; Gregory Welsh, Asst. Commonwealth's Attorney; Phillip R. Brooks, Seymour Bates, Alvin Sheffield, Carliss A. Batts, Estelle G. Evans, William F. McCoy, Elbert L. Pugh, Special Grand Jury Members,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: March 3, 1982 Decided: May 20, 1982

Before HALL and SPROUSE, Circuit Judges and POTTER,* District Judge.

---

* Honorable Robert D. Potter, United States District Judge for the Western District of North Carolina, sitting by designation.

Opinion of the United States Court of Appeals for the Fourth Circuit

Burton W. Sandler (Clarence B. Neblett, Jr.; Lawrence E. Blake on brief) for Appellants; Sidney Barney, Commonwealth's Attorney; Leslie Lindsey, Jr., Assistant Commonwealth's Attorney for Appellees.

SPROUSE, Circuit Judge:

Thomas F. Craig, Jr., and Orrin Lankford appeal the district court's dismissal of their amended complaint seeking to enjoin special state grand jury proceedings in Petersburg, Virginia. Since the district court, in ordering the dismissal, correctly relied on the abstention doctrine, we affirm.

Craig and Lankford, who manage adult bookstores in Petersburg, were summoned to appear before a special state grand jury on May 29, 1981, and to produce the following:

> 1. All books and records, including invoices, journals, ledgers, and cancelled checks relating to the purchase of any publication which is offered for sale on the date this subpoena is issued.
>
> 2. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years preceding the date this subpoena is served.
>
> 3. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.

> 4. One copy of each and every book, magazine, pamplet [sic], or other publication which of [sic] offered for public sale on the date this subpoena is served.

The appellants were informed that police would inventory all publications sold at their bookstores and that appellants could either surrender the subpoenaed material at the time of the inventory or produce it before the special grand jury. Lankford surrendered his records and one copy of each publication at the time of inventory, but Craig refused to do so. On May 29, the appellants moved to quash the subpoena and a hearing on this motion was held in Petersburg Circuit Court on June 22. The court ruled that the appellants did not have to testify because they had received inadequate notice, but that the portion of the subpoena which compelled the production of records and one copy of each publication was valid.

New subpoenas requiring the appellants to appear and testify were issued July 9; Craig's subpoena also required production of all items included in the original subpoena, while Lankford's subpoena excluded magazines which he had already produced.

On July 21, Craig and Lankford filed suit in federal district court to enjoin the special grand jury proceedings. Their motion for a temporary restraining order was denied. The appellants filed an amended complaint seeking a preliminary injunction on August 6, and the district court, invoking the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), dismissed the complaint on September 16.

Younger, of course, requires federal courts to refrain from hearing constitutional challenges to state action in certain

circumstances where federal judicial intervention is regarded as an improper intrusion into the rights of a state to enforce its laws in its own courts. 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction §4251 (1978). "A federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." *Samuels v. Mackell,* 401 U.S. 66 (1971).

The appellants first contend that dismissal by the district court was unwarranted because there was no pending state criminal prosecution. The appellants, however, view too narrowly both the facts in the case *sub judice* and the breadth of *Younger's* applicability. It is true, looking at the facts, that the appellants presently are not under indictment and that under Virginia law the special grand jury has no power to indict. Va. Code Ann. §19.2-191(2) (1981 Cum. Supp.). The appellants, however, are subject to the contempt power of the state court if they refuse to comply with the subpoena, and they therefore have access to a forum for the presentation of their constitutional defenses.

One rationale underlying the "pending prosecution" requirement is that the federal courts should not dismiss unless the state proceeding has reached a stage that assures the federal plaintiff an opportunity to present its constitutional defenses at some point during the on-going proceeding.

> [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless

> plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v. Thompson, 415 U.S. 452 (1974). In the case *sub judice*, appellants have the requisite opportunity to vindicate their constitutional rights. Also, contrary to appellants' suggestion, Virginia law appears to afford them other opportunities to challenge the constitutionality of the subpoenas even absent any grand jury indictment. The record is clear, however, that plaintiffs neither appealed the state circuit court's decision refusing to quash the subpoena nor sought a writ of mandamus to the Virginia Supreme Court of Appeals.

Turning to the breadth of *Younger's* applicability, the Supreme Court now has indicated that the doctrine bars any interference with the state's judicial process which creates an "offense to the State's interest" similar or equal to that created by interference with a state criminal proceeding. *Juidice v. Vail*, 430 U.S. 327 (1977). Virginia's interest in the unfettered operation of its grand jury system is as important as a state's interest in the operation of its contempt process, which the *Vail* court recognized as sufficient to invoke the *Younger* doctrine.

The appellants next argue that even assuming that *Younger* is theoretically applicable to these state proceedings, its use is inappropriate here since the seizure of their publications constituted a "chilling effect" on their first amendment rights which created the requisite "immediate irreparable injury" justifying federal equitable relief.

The short answer to this contention is that although the materials subpoenaed enjoy presumptive first amendment protection, there is no evidence, other than appellants' bald assertion, that the subpoena of one copy of each publication threatened to suppress or chill their first amendment rights. The judgment is, therefore, affirmed.

AFFIRMED.

AMENDED COMPLAINT FOR PRELIMINARY INJUNCTION, DECLARATORY DECREE, AND FOR RETURN OF UNLAWFULLY SEIZED PROPERTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NO:
JUDGE:

THOMAS FLETCHER CRAIG, JR.
2101 E. Washington Street
Petersburg, Virginia

and

ORRIN T. LANKFORD
2058 County Drive
Petersburg, Virginia

Plaintiffs

v.

SIDNEY BARNEY
Commonwealth's Attorney
Courthouse Hill
Petersburg, Virginia

and

GREGORY WELSH
Assistant Commonwealth's Attorney
Courthouse Hill
Petersburg, Virginia

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

and

PHILLIP R. BROOKS
Special Grand Jury Foreman
1044 Blair Road
Petersburg, Virginia

and

SEYMOUR BATES
Special Grand Jury Member
1917 S. Westchester Drive
Petersburg, Virginia

and

ALVIN SHEFFIELD
Special Grand Jury Member
1925 Cumberland Avenue
Petersburg, Virginia

and

CARLISS A. BATTS
Special Grand Jury Member
124 S. Dunlop Street
Petersburg, Virginia

and

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

ESTELLE G. EVANS
Special Grand Jury Member
425 Mistletoe Street
Petersburg, Virginia

and

WILLIAM F. McCOY
Special Grand Jury Member
816 Farmer Street
Petersburg, Virginia

and

ELBERT L. PUGH
Special Grand Jury Member
1646 LaMar Avenue
Petersburg, Virginia

Defendants

Serve Process On:
Phillip R. Brooks
Special Grand Jury Foreman
1644 Blair Road
Petersburg, Virginia

COUNT I

JURISDICTION

1. This action seeks a preliminary injunction and permanent injunction to restrain the Defendants and their agents,

representatives, employees, assigns and successors and anyone acting in concert with them, from obstructing, hindering or otherwise interfering with Plaintiffs' rights under the *Constitution of the United States.*

2. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

3. This action arises under the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and this Court has jurisdiction under 28 U.S.C. 1331. Jurisdiction is further based on 28 U.S.C. 1343, as this is an action to secure equitable relief for the protection of Plaintiffs' civil rights pursuant to *42 U.S.C. 1983*. Plaintiffs also seek a declaratory judgment under *28 U.S.C. 2201 and 2202*, declaring the Special Grand Jury proceeding unconstitutional as applied to Plaintiffs and in its threatened application.

4. Suit is further founded on *28 U.S.C. Section 1343(4)* "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . as well as *Article III, Section 2* of the *Constitution of the United States.*"

5. Prayer for Declaratory relief is founded on *Rule 57* of the Federal Rules of Civil Procedure, as well as *28 U.S.C. Section 2207.*

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT II

PARTIES

7. Plaintiffs are involved in the operation of adult bookstores that make available to the adult public material that is "presumptively protected" under the *First Amendment* to the *United States Constitution*.

8. Defendants are a Special Grand Jury of Petersburg, Virginia and the Commonwealth's attorney for Petersburg, Virginia, acting through his deputy attorney, all citizens and residents of the Commonwealth of Virginia.

COUNT III

FACTUAL ALLEGATIONS AND OVERT ACTS

9. The Honorable Oliver A. Pollard, Jr., Judge of Circuit Court of Petersburg, Virginia, impaneled a Special Grand Jury at the request of the regular Grand Jury for the April term, to investigate incidents of alleged prostitution in the adult bookstore of Petersburg, Virginia. This Special Grand Jury consists of the same seven (7) persons as the Grand Jury which had heard testimony pursuant to a prostitution trial involving an alleged oral sex incident at an adult bookstore.

10. A Subpoena issued and signed by the Foreman of the Special Grand Jury on May 22, 1981, summoned the Plaintiffs to appear before this Special Grand Jury on May 29, 1981, and required Plaintiffs' presence and the production of the following:

a. All books and records, including invoices, journals, ledgers and cancelled checks relating to the purchase of any publication which is offered for public sale on the date this subpoena is served.

b. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years precceding the date this subpoena is served.

c. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.

d. One copy of each and every book, magazine, pamphlet or other publication which is offered for public sale on the date this subpoena is served.

11. Concurrent with the subpoena, Mary Gregory Welsh, Deputy Attorney for the City of Petersburg, Virginia, wrote to Plaintiffs informing Plaintiffs that the exact contents of any testimony they may give at the Special Grand Jury proceeding cannot be divulged, unless the Plaintiffs were subsequently prosecuted for perjury.

12. The Deputy Attorney did not inform Plaintiffs that the Special Grand Jury would subsequently report to the Circuit Court of Petersburg, Virginia, the findings of its investigation and make recommendations to the Circuit Court, which though sealed, would with Court order, be open to public inspection and could result in bills of indictment before a regular Grand Jury for alleged criminal offenses. *Va. Code §19.2-213, §19.2-214.*

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

13. The Commonwealth's Deputy Attorney also informed Plaintiffs that an officer would inventory all retail publications offered for public sale at the Plaintiffs' place of employment.

14. In the letter aforementioned, and pursuant to the subpoenaes aforementioned, Plaintiffs were told that they could surrender the material inventoried by the police at the time of the inventory or produce the same before the Grand Jury. If the materials were not so provided, the same would be seized.

15. Plaintiff Lankford surrendered all of the publications inventoried at the time the inventory was made. Plaintiff Craig refused to do so on *First*, *Fourth*, *Fifth* and *Fourteenth Amendment* grounds.

16. The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, held, at a special hearing on May 29, 1981, that Plaintiffs must appear before the Special Grand Jury, as subpoenaed. At this special hearing, Plaintiffs filed a Motion to Quash the aforementioned subpoena, and the Honorable Oliver A. Pollard, Jr., set a hearing on this Motion for June 22, 1981.

17. At the Special Grand Jury proceeding on May 29, 1982, Plaintiffs Craig and Lankford asserted their rights under the *Fifth Amendment* to the *United States Constitution*, refusing to testify. Plaintiff Craig also refused to reproduce tangible evidence. The Foreman of the Special Grand Jury requested the Deputy Commonwealth Attorney move the Circuit Court that the Plaintiffs be held in contempt.

18. On June 22, 1981, at the hearing on the Motion to Quash the aforementioned subpoena, the Honorable Oliver A. Pollard,

Jr. ruled that Plaintiffs could not be compelled to testify under the subpoena in question, as it failed to provide Plaintiffs with adequate notice that testimony would be required of them, under Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenaes in question. *Transcript 2 (p. 18)*

19. The Honorable Oliver A. Pollard, Jr. also set a hearing on whether Plaintiffs could be compelled to answer questions or produce documents under a new subpoena for June 30, 1981. *Transcript 1 (p. 54)*

20. Judge Pollard stated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to Petitioner within a "reasonable amount of time." *Transcript 1 (p. 58)*

21. Judge Pollard also requested that the Special Grand Jury submit questions it intended to ask Plaintiffs to the Court on June 30, 1981. At that time, the Court would rule on whether Plaintiffs could assert their *Fifth Amendment* rights to any or all of the aforementioned questions.

22. At the subsequent hearing on June 30, 1981, the Court again stated that Plaintiffs must produce the documents and magazines in question pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury." *Transcript 2 (p. 10)*

23. Later in the same hearing, however, the Court "ruled . . . that the subpoena was invalid." (p. 18). Upon the strength

of this conflicting ruling on the validity of the old subpoena, and subsequent voidness of the proceedings before the Special Grand Jury, the Court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the Court, prior to the conclusion of the Special Grand Jury's investigation, in violation of *Va. Code §19.2-212*. The Court then ruled separately and specifically on whether compelling Plaintiffs to answer any question taken from that record would violate Plaintiffs' *Fifth Amendment* rights.

24. The Court, in conclusion, ordered Plaintiff Craig to produce the documents and magazines heretofore listed pursuant to, an as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m. The Court also ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena upon Plaintiff Lankford and ordered him to produce the remaining documents and to testify pursuant to an as yet unissued new subpoena for July 31, 1981 at 9:00 a.m.

25. On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Petitioner Craig. Petitioner Craig's subpoena contained requests for the production of documents and magazines as listed on the old subpoena's parts a, b, c and d but referring only to the date of the new subpoena's issuance.

26. On July 9, 1981, the Speical Grand Jury's Foreman issued a new subpoenae to Petitioner Lankford. Plaintiff Lankford's subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, b, and c. Plaintiff Lankford is not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite its "invalidation."

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT IV

OVERT ACTS

27. The Defendants are coercing Plaintiffs into giving evidence that may lead to their own prosecution. Specifically, Plaintiffs have been, or are being, forced to produce magazines and documents which belong to them and/or are in their possession, in violation of Plaintiffs' rights under the *Fifth Amendment* to the *United States Constitution*. Such evidence can serve as on the basis of criminal indictments against Plaintiffs. Thus, Plaintiffs are confronted with real, immediate and irreparable injury, unless their constitutional rights can be vindicated.

28. The Defendants have, or are, coercing Plaintiffs into surrendering a massive quantity of books and magazines that are presumptively protected under the *First Amendment* to the *United States Constitution* without a showing of necessity or materiality whatsoever. Whereas, the *Fourth Amendment* to the *Constitution of the United States* provides protection against a Grand Jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable and this particular subpoena duces tecum treads upon *constitutionally protected freedoms* under the *First Amendment*, the subpoenaes in question are unduly broad and effect an unreasonable search and seizure in violation of Plaintiffs' Fourth and *First Amendment* rights and inflicting real, immediate and irreparable injury upon Plaintiffs.

29. The Defendants have denied Plaintiff Lankford of due process of law by invalidating the original subpoena duces tecum at the hearing on June 30, 1981 and releasing the record of

proceedings under the old subpoena, but holding a quantity of Plaintiff's magazines and books under power and comulstion of the earlier, invalidated subpoena. These books were seized on May 22, 1981. Despite this "invalidation" some books are still being held under the old subpoena, with Court sanction, effecting a "chill" on Plaintiffs' *First Amendment* rights and a denial of due process.

30. The Defendants have denied Plaintiffs due process and equal protection of law by releasing for Court inspection, a record containing questions and statements given at a Special Grand Jury proceeding, in violation of *Va. Code §19.2-212*, prior to the conclusion of the Special Grand Jury's investigation.

31. The Defendants have denied Plaintiffs due process of law by randomly and illogically applying the law of the Commonwealth of Virginia in enforcing the subpoenaes of Plaintiffs and their tangible evidence. Specifically, the Commonwealth concedes that *Va. Code Rule 3A:15* applies to a subpoena before a Special Grand Jury, but that mandatory language of that section, requiring authorization of that subpoena by court order, is unapplicable. Resultingly, the Commonwealth has inconsistently applied that section, denying Plaintiffs equal protection and due process of the law.

32. The complained of actions, conduct and behavior of Defendants have effected, or will effect, a prior restraining of Plaintiffs' *First Amendment* rights, by taking a massive quantity of magazines and books for an indefinite amount of time. Such a seizure will do immediate and irreparable harm to Plaintiffs by effecting a "chill" on Plaintiffs' *First Amendment* rights.

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

33. The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Subsequently, Plaintiffs cannot assert their constitutional rights in a single state proceeding. Likewise, Plaintiffs have presented, in Motions to Quash the subpoena in question and in Memorandums in Support of Motions, their claims for constitutional relief, which have been rejected by the Circuit Court in Petersburg, in its interlocutory decrees. These decrees, interlocutory in nature, are not appealable; thus, Plaintiffs' rights cannot be vindicated in any ongoing single state proceeding. Therefore, as irreparable injuries and damages to Plaintiffs' constitutional rights are both great and immediate and cannot be vindicated in any single state proceeding, Plaintiffs' only recourse to restrain further violation of constitutional guarantees, is in this federal forum.

34. The acts, conduct and behavior of Defendants effecting a prior restraint of Plaintiffs' *First Amendment* rights, evidence an intention on the part of Defendants to use the subpoena mechanism of the Special Grand Jury to seize an excessive number of Plaintiffs' presumptively protected magazines, harass Plaintiffs in their business activities and induce Plaintiffs into closing their stores. By attempting to intimidate and stop Plaintiffs from engaging in their businesses by means of the Special Grand Jury mechanism and the real threat of criminal prosecution, defendants have engaged in *bad faith* enforcement of the law, entitling Plaintiffs to injunctive relief from such enforcement under *42 U.S.C. 1983*.

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

COUNT V

DEPRIVATION OF CONSTITUTIONAL RIGHTS PRIVILEGES AND IMMUNITIES UNDER COLOR OF STATE LAW

35. Plaintiffs incorporate by reference and reallege the contents of Paragraphs 1 through 34 above.

36. *This cause of action arises under the United States Constitution and under 42 U.S.C. 1983.*

37. Each and all of the acts of Defendants alleged in Paragraphs 1 through 34 above were done by Defendants, not as individuals, but under the color and pretense of the statutes of the Commonwealth of Virginia, and under the alleged authority of their respective offices and duties.

38. The conduct of Defendants deprived Plaintiffs of the following rights, privileges and immunities secured to them by the *Constitution of the United States*:

a. The right of Plaintiffs under the *First and Fourteenth Amendments.*

b. The right of Plaintiffs to be secure in person and effects against unreasonable search and seizure under the *Fourth and Fourteenth Amendments.*

c. The right of Plaintiffs to refuse to incriminate themselves or give evidence which may tend to lead to their criminal prosecution, either by testimony or by an unlawful search and seizure under the *Fourth, Fifth and Fourteenth Amendments.*

d. The right of Plaintiffs not to be deprived of life, liberty or property without due process of law, and the right to equal protection of the laws, secured by the *Fifth* and *Fourteenth Amendments*.

The acts, conduct and behavior of Defendants entitle Plaintiffs to compensatory damages and to declaratory and equitable relief as set forth hereafter.

RELIEF SOUGHT

WHEREFORE, Plaintiffs respectfully pray the Court as follows:

1. That this Court on Motion of Plaintiffs after hearing issue a preliminary and permanent injuction enjoining all Defendants, their agents and/or employees from future violations of Plaintiffs' *First, Fourth, Fifth* and *Fourteenth Amednment* rights. This request includes, but it is not limited to, the following:

a. Enjoin the Court from compelling the reproduction of any documents or magazines before the Special Grand Jury and order that any documents or magazines taken pursuant to earlier invalidated subpoenas be return immediately.

b. Enjoin any and all prosecution of Plaintiff Lankford based on evidence turned over by him under coercion of the earlier, invalidated subpoenas.

c. Enjoin the Special Grand Jury, as now empanelled, from any further proceeding for having released records of its proceedings prior to the conclusion of its investigation in violation

of Va. Code §19.2-212, denying Plaintiffs equal protection and due process of law.

d. Plaintiffs request that this Court enter a declaratory decree pursuant to *28 U.S.C. Section 2201 and 2202* to the effect that the Special Grand Jury proceeding is being unconstitutionally applied to Plaintiffs in light of Plaintiffs' *First, Fourth, Fifth* and *Fourteenth Amendment* rights because of unconstitutional interlocutory decrees and the conduct of the Defendants.

e. Plaintiffs further request that this Court award Plaintiffs their attorneys' fees and court costs in accordance with *42 U.S.C. 988* and such other relief as the Corut deems just and proper.

JURY TRIAL DEMAND

Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury, on all issues.

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Plaintiffs

Amended Complaint for Preliminary Injunction, Declaratory Decree, and for Return of Unlawfully Seized Property

---

Clarence B. Neblett, Jr.
5905 W. Broad Street
Richmond, Virginia 23230
(804) 282-5656
Attorney for Plaintiffs

Lawrence Blake, Esq.
Route 106
Prince George, Virginia 23875
(804) 732-3422
Attorney for Plaintiffs

MOTION FOR TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THOMAS FLETCHER CRAIG, JR., *et al*,
Plaintiffs

v.

SIDNEY BARNEY, *et al*,
Defendants

TO THE HONORABLE
THE JUDGE OF SAID COURT:

Plaintiffs, by and through their attorney, Burton W. Sandler, Esquire, or Counsel, and Clarence B. Neblett, Jr., Esquire, complaining of the Defendants, moves this Honorable Court under the provisions of *Rule 65(b)* of the *Federal Rules of Civil Procedure*, enjoining Defendants Sidney Barney, Commonwealth's Attorney, Gregory Welsh, Assistant Commonwealth's Attorney, Phillip R. Brooks, Special Grand Jury Foreman, Seymour Bates, Special Grand Jury Member, Alvin Sheffield, Special Grand Jury Member, Carliss A. Bates, Special Grand Jury Member, Estelle G. Evans, Special Grand Jury Member, William F. McCoy, Special Grand Jury Member, and Filbert L. Pugh, Special Grand Jury Member from:

(a) compelling or in any way requiring the production of any documents, books, or magazines before the Special Grand Jury pursuant to any subpoena

(b) witholding any books or magazines taken pursuant to any invalidated or otherwise illegal subpeona

(c) innitiating any criminal prosecution of Plaintiff Lankford based on evidence turned over by him under coercion of an invalidated or otherwise illegal subpeona

(d) any further investigations by the Special Grand Jury pending a declaratory decree under *28 U.S.C. 2201* and *2202* as to the legality of that investigatory body's further impanelment for having willfully and wantonly violated *Va. Code §19.2-212*, the law of the body's creation, and having further violated Plaintiff's right to equal protection and due process of law under the *Fifth* and *Fourteenth Amendments* to the *United States Constitution*.

If the Defendants are not so ordered and enjoined immediately, irreperable, severe and immediate harm will result to Plaintiffs, and the same Plaintiffs will be deprived of rights secured to them by the *First*, *Fourth*, *Fifth*, and *Fourteenth Amendments* to the United States Constitution, as more particularly described in the Memorandum in Support of Plaintiffs Motion for Temporary Restraining Order, and other exhibits attached hereto, and filed herewith.

If the Temporary Restraining Order be issued as prayed, the injury to the Defendants, if any injury at all, will be so slight that only a token bond covering costs of this proceeding is required under *Rule 65(c)* of the *Federal Rules of Civil Procedure*.

Motion for Temporary Restraining Order

Plaintiffs must resort to this Court to vindicate their Constitutional rights. The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Consequently, Plaintiffs cannot assert their Constitutional rights in an ongoing state proceeding, as they are not prisoners at bar. Likewise, Plaintiffs have presented, in *Motions to Quash* the subpoenaes in question, and in *Memorandums in Support of Motion to Quash* the subpoenaes in question, their claims for constitutional relief, which have been denied by the Circuit Court of Petersburg, Virginia. As the Circuit Court's decrees are interlocutory, they are not appealable. Thus, Plaintiffs rights cannot be vindicated, before immediate harm and injury is done to Plaintiffs, in any ongoing single state proceeding.

The undersigned attorneys for Plaintiffs avers that the herein named Defendants are aware that a complaint has been filed in this Court on , July , 1981 at .M. and have been advised that, because of their subsequent activity, and attempt will be made to move for a *Temporary Restraining Order* and said Defendants have been provided, through their counsel, with copies of the pleadings herein. The undersigned attorneys further aver that the Defendants have been requested to appear in person or through their counsel, at the time that a *Temporary Restraining Order* will be requested.

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Plaintiffs

Respectfully submitted,

Clarence B. Neblett, Jr.
5905 W. Broad Street
Richmond, Virginia 23230
(804) 282-5656
Attorney for Plaintiffs

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No.

JUDGE:

THOMAS FLETCHER CRAIG, JR., et al.,

Plaintiffs

v.

SIDNEY BARNEY, et al.,

Defendants

Plaintiffs herein respectfully submit to this Honorable Court this Memorandum in Support of Motion For Temporary Restraining Order heretofore filed with this Honorable Court.

FACTS

The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, impaneled a Special Grand Jury at the request of the regular Grand Jury for the April term, to investigate incidents of alleged prostitution in the adult bookstores of Petersburg, Virginia. This Special Grand Jury consists of the same seven (7) persons as the Grand Jury which had heard testimony pursuant to a prostitution trial involving an alleged oral sex incident at an adult bookstore.

Memorandum in Support of Motion for Temporary Restraining Order

A subpoena issued and signed by the Foreman of the Special Grand Jury on May 22, 1981, summoned the Plaintiffs to appear before this Special Grand Jury on May 29, 1981, and required Plaintiffs presence and the production of the following:

> a. All books and records, including invoices, journals, ledgers and cancelled checks relating to the purchase of any publication which is offered for public sale on the date this subpoena is issued.
>
> b. All books and records, including tax returns, information returns, journals and ledger relating to gross sales in the two years preceeding the date this subpoena is served.
>
> c. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.
>
> d. One copy of each and every book, magazine, pamphlet or other publication which is offered for public sale on the date this subpoena is served.

Concurrent with the subpoena, Mr. Gregory Welsh, Deputy Commonwealth Attorney for the City of Petersburg, Virginia, wrote to Plaintiffs informing Plaintiffs that the exact contents of any testimony they may give at the Special Grand Jury proceeding cannot be divulged, unless the Plaintiffs were subsequently prosecuted for perjury.

Memorandum in Support of Motion for Temporary Restraining Order

The Deputy Attorney did not inform Plaintiffs that the Special Grand Jury would subsequently report to the Circuit Court the findings of its investigation and make recommendations to the Circuit Court, which though sealed, would, with Court order, be open to public inspection and could result in bills of indictment before a regular Grand Jury for alleged criminal offenses. *Va. Code §19.2-213, §19.2-214.*

The Commonwealth's Deputy Attorney also informed Plaintiffs that an officer would inventory all retail publications offered for public sale at Plaintiffs' place of employment.

In the letter aforementioned, and pursuant to the subpoenaes aforementioned, Plaintiffs were told that they could surrender the material inventoried by the police at the time of the inventory or produce the same before the Grand Jury. If not, the same would be seized.

Plaintiff Lankford surrendered all of the publications inventoried at the time of the inventory. Plaintiff Craig refused to do so on *First, Fourth, Fifth* and *Fourteenth Amendment* grounds.

The Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia, held, at a special hearing on May 29, 1981, that Plaintiffs must appear before the Special Grand Jury, as subpoenaed. At this special hearing, Plaintiffs filed a Motion to Quash the aforesaid subpoena. The Honorable Oliver A. Pollard, Jr. set a hearing of this Motion for June 22, 1981.

At the Special Grand Jury proceeding on May 29, 1981, Plaintiffs Craig and Lankford asserted their rights under the *Fifth*

Amendment to the *United States Constitution,* refusing to testify. Plaintiff Craig also refused to produce tangible evidence. The Foreman of the Special Grand Jury requested that the Deputy Commonwealth Attorney move the Court that the Plaintiffs be held in criminal contempt.

On June 22, 1981, at the hearing on the Motion to Quash the aforementioned subpoena, the Honorable Oliver A. Pollard, Jr. ruled that Plaintiffs could not be compelled to testify under the subpoena in question, as it failed to provide Plaintiffs with adequate notice that testimony would be required of them, under Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenaes in question. Transcript 2 (p. 18).

The Honorable Oliver A. Pollard, Jr. also set a hearing on whether Plaintiffs could be compelled to answer question or produce documents under a new subpoena for June 30, 1981. *Transcript 1 (p. 54).*

Judge Pollard stated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to Plaintiff within a "reasonable amount of time." *Transcript 1 (p. 58).*

Judge Pollard also requested that the Special Grand Jury submit questions it intended to ask Plaintiffs to the Court on June 30, 1981. At that time, the Court would rule on whether Plaintiffs could assert their *Fifth Amendment* rights to any or all of the aforementioned questions.

Memorandum in Support of Motion for Temporary Restraining Order

At the subsequent hearing on June 30, 1981, the Court again stated that Plaintiffs must produce the documents and magazines in question pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury." *Transcript 2 (p. 10).*

Later in the same hearing, however, the Court "ruled . . . that the subpoena was invalid." (p. 18). Upon the strength of this conflicting ruling on the validity of the old subpoena and subsequent "voidness" of the proceedings before the Special Grand Jury, the Court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the Court, prior to the conclusion of the Special Grand Jury's investigation, in violation of *Va. Code* §19.2-212. The Court then ruled separately and specifically on whether compelling Plaintiffs to answer any questions taken from that record would violate Plaintiffs' *Fifth Amendment* rights.

The Court, in conclusion, ordered Plaintiff Craig to produce the documents and magazines heretofore listed pursuant to and, as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m. The Court also ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena upon Plaintiff Lankford and ordered him to produce the remaining documents and to testify pursuant to an, as yet, unissued new subpoena for July 31, 1981 at 9:00 a.m.

On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Plaintiff Craig. Plaintiff Craig's subpoena contained requests for the production of documents and magazines as listed in the old subpoena's parts a, b, c and d, but referring only to the date of the new subpoena's issuance.

Memorandum in Support of Motion for Temporary Restraining Order

On July 9, 1981, the Special Grand Jury's Foreman issued a new subpoena to Plaintiff Lankford. Plaintiff Lankford's subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, c and c. Plaintiff Lankford is not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite its "invalidation."

I.

PLAINTIFFS MUST RESORT TO A FEDERAL COURT TO VINDICATE THE VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Generally, a Federal Court will not intervene in an ongoing state proceeding. *Younger v. Harris,* 401 U.S. 37 (1971).

However, one may resort to Federal Courts to enjoin a state proceeding where immediate, irreparable and real injury is alleged and Plaintiffs' rights cannot be vindicated in any ongoing single state proceeding. *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

Plaintiffs herein must resort to this Federal forum to vindicate their constitutional rights.

The Defendants, as of yet, have brought no criminal charges against Plaintiffs. Subsequently, Plaintiffs cannot assert their constitutional rights in any ongoing state criminal proceeding.

Likewise, Plaintiffs have presented, in Motions to Quash subpoenaes in question and in Memorandum in Support of

Motions, their claims for constitutional relief, which have been rejected by the Circuit Court of Petersburg, Virginia.

As the Court's decrees are interlocutory and not appealable, Plaintiffs' rights cannot be vindicated, before immediate and irreparable harm and injury herein alleged is done to Plaintiffs in any ongoing single state proceeding.

II.

REQUIRING PETITIONERS TO PRODUCE PRIVATE BOOKS AND RECORDS THAT WOULD INCRIMINATE THEM CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE AND VIOLATES PLAINTIFFS' FIFTH AMENDMENT RIGHTS.

The *Fifth Amendment* generally protects individuals from coercion to prove a charge against themselves "out of [their] own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1963). It is uncontroverted, both in law and in the Commonwealth, that Plaintiffs have *Fifth Amendment* rights before the Special Grand Jury.

The *Fifth Amendment* applies to the production of documents, as well as to testimony.

> "[U]nreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, throws light on the question as to what is an

Memorandum in Support of Motion for Temporary Restraining Order

> "unreasonable search and seizure. . .' And we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States,* 116 U.S. 616, 663.

Clearly, a mechanism exists whereby the production of documents in question and the subsequent report by the Special Grand Jury could result in criminal prosecution of Plaintiff. Va. Code §19.2-213, §19.2-214.

While a corporation has no *Fifth Amendment* rights, *Oklahoma Press Publishing Co. v. Wallings,* 329 U.S. 186 (1946), a Grand Jury cannot require the production by a person of *private books and records* that would incriminate him. *U.S. v. Dionisio,* 410 U.S. 1, 12 (1972).

In Plaintiff Lankford's case, all of the books and records in question are privately owned by him.

In Plaintiff Craig's case, the subpoenaes are addressed to Craig as an individual, not to any corporation. Thus, all records or documents taken by the Special Grand Jury pursuant to this subpoena are considered personal to Plaintiff Craig.

Wherefore, both Plaintiffs should be allowed to assert *Fifth Amendment* rights not to present books or records that would incriminate Plaintiffs. Likewise, Plaintiffs cannot be compelled to produce books or records that would lead to prosecution or lead to other evidence used in prosecution of Plaintiffs. *Kastigar v. U.S.,* 406 U.S. 441, 453 (1972).

Memorandum in Support of Motion for Temporary Restraining Order

III.

THE SUBPOENA IN QUESTION IS UNDULY BROAD, CONSTITUTING AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF PETITIONERS' FOURTH AND FIRST AMENDMENT RIGHTS.

A subpoena duces tecum can effect a search and seizure.

> "While a search ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case,* the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, *be he individual or corporation,* is entitled to protection. (emphasis mine). *Hale v. Henkel,* 201 U.S. 43, 76 (1906).

The *Fourth Amendment* provides protection against a Grand Jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable. *U.S. v. Dionisio,* 410 U.S. 1, 12-13, *Hale v. Henkel,* 201 U.S. at 77.

The scope of this subpoena is surely broad enough to be characterized as "sweeping." As the Supreme Court so aptly states:

> "[I]ndeed, it is difficult to say how its business could be carried on after [Petitioners] had been denied of this mass of material, which is not shown to be necessary in the prosecution of this case [or

> the investigation at hand], and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena.

The Court continues:

> [S]ome necessity should be shown, either from an examination of the witness orally, or from the known transaction of these [bookstores] with other companies implicated or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Hale v. Henkel,* 201 U.S. at 77.

By requiring the production of this material before the Special Grand Jury, Plaintiffs are being coerced into surrendering a massive quantity of books and magazines without any showing of materiality or necessity whatsoever. The unduly broad subpoenaes in question, thus, effect an unreasonable search and seizure.

The books and records subpoenaed are presumptively protected by the *First Amendment,* and must be proven at a prior adversarial hearing or before a neutral and detached judicial officer to be contraband, *Heller v. New York,* 413 U.S. 483 (1973); *Freedman v. Maryland,* 380 U.S. 51 (1964); *Bantam Books v. Sullivan,* 372 U.S. 58 (1961); *McKinney v. Alabama,* 429 U.S. 669, 678 (1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561 (1975).

Memorandum in Support of Motion for Temporary Restraining Order

Where such a quantity of papers and books are requested for production, the burden of proving materiality already rests with the Special Grand Jury. That burden must be forthrightly met when they tread upon constitutionally protected freedoms and demand the production of presumptively protected materials; otherwise, such a taking can only effect a constitutionally forbidden "prior restraint" on the right to free expression. In this instance, the securing of magazines and books in so massive a quantity has clearly put a "chill" on Plaintiff Lankford's *First Amendment* rights. Unless this Court enjoins the enforcement of said subpoenaes, Plaintiff Craig's rights under the *First* and *Fourth Amendments* to the *United States Constitution* will also be severly and indelibly violated.

IV.

PLAINTIFF LANKFORD'S BOOKS AND MAGAZINES, SEIZED PURSUANT TO AN ILLEGAL AND OTHERWISE INVALIDATED SUBPOENA, MUST BE IMMEDIATELY RETURNED AND ANY PROSECUTION BASED UPON THEM, ENJOINED.

As stated in Part II, the original subpoena duces tecum in question requires the production of materials by Plaintiff that could result in Plaintiffs' criminal prosecution as a result of the Special Grand Jury's investigation of "criminal activity". Resultingly, effecting the subpoena duces tecum in question would violate Plaintiffs' *Fifth Amendment* rights, and, as such, effect an unreasonable search and seizure under the *Fourth Amendment* to the *United States Constitution.*

Thus, the subpoenaes are, or should be, declared illegal and void and all materials seized pursuant to them should be returned immediately.

Likewise, as stated in Part III, the subpoenae duces tecum(s) require the production of a massive quantity of books without any showing of necessity or materiality, and also require the production of magazines and books that are presumptively protected under the *First Amendment.* Thus, the subpoena in question, per se, effects an unreasonable search and seizure and is illegal. All materials of Plaintiff Lankford pursuant to this illegal subpoena should be returned immediately.

Finally, the first subpoena duces tecum was declared invalid on June 30, 1981. However, materials seized, pursuant to that subpoena, were and are still being held. Thus, Plaintiff has, in effect, had materials seized from him by police officers without sanction of any subpoena or search warrant.

Resultingly, Plaintiff Lankford has been denied his constitutional right to be secure in person and effects against unreasonable searches and seizures under the *Fourth and Fourteenth Amendments.* These materials *must* be returned immediately to preclude further irreparable injury to Plaintiffs' constitutional rights against self-incrimination and to due process of law.

Furthermore, evidence obtained pursuant to the *per se* unreasonable search and seizure must be suppressed and any prosecution on the strength of this evidence enjoined, given that this evidence was illegally wrenched from Plaintiffs' possession.

Memorandum in Support of Motion for Temporary Restraining Order

V.

BY RELEASING RECORDS OF THEIR PROCEEDINGS PRIOR TO THE CONCLUSION OF THEIR INVESTIGATION, THE SPECIAL GRAND JURY HAS VIOLATED VA. CODE §19.2-212. RESULTINGLY, THIS INVESTIGATORY BODY SHOULD BE DISBANDED OR THEIR FURTHER PROCEEDINGS ENJOINED FOR WILLFULLY AND WANTONLY VIOLATING THE LAW OF ITS CREATION AND DENYING PLAINTIFFS DUE PROCESS AND EQUAL PROTECTION OF LAW.

Va. Code §19.2-212 states in part:

> "The notes, tapes and transcriptions of the reporter are for the sole use of the Special Grand Jury and the contents thereof shall not be divulged by anyone except as hereinafter provided. After the Special Grand Jury has completed its use of the said notes, tapes and transcriptions, the foreman shall cause them to be sealed, the container dated and divulged to the Court.
>
> The Court shall cause the sealed container to be kept safely. If any witness testifying before the Special Grand Jury is prosecuted for perjury, the Court, on motion of either the attorney for the Commonwealth or the Defendant, shall permit them both to have access to the testimony given by the Defendant when a witness before the Special Grand Jury and the said testimony shall be admissible in the perjury case."

Memorandum in Support of Motion for Temporary Restraining Order

Plaintiffs have not subsequently been prosecuted for perjury. And yet, when asked by counsel for Plaintiffs how the Special Grand Jury forwarded its questions for Plaintiffs to the Court, the Deputy Commonwealth Attorney, Mr. Gregory Welsh, replied:

> "I asked the Special Grand Jury for a list of questions they would like asked so you can rule on them. *I was given a copy of the transcript* (from the May 29, 1981 hearing before the Special Grand Jury) with questions marked and from that, my secretary typed the questions as the Special Grand Jury requested, and then I forwarded them on to the Court and counsel. . ."

(emphasis mine). *Transcript 2 (p. 14).* By releasing the transcript of the procedure to the Commonwealth's Attorney, before the Special Grand Jury without court order and prior to the conclusion of its investigation, the Special Grand Jury violated mandatory provisions of Va. Code §19.2-212.

Moreover, the Special Grand Jury may have unwittingly turned over, to the state, evidence containing Plaintiffs' own testimony; evidence that may now lead to the Plaintiffs' prosecution. Provisions of Va. Code §19.2-212 were clearly designed to preclude the wholesale surrender of incriminating evidence produced before a Special Grand Jury for public inspection and possible criminal prosecution.

Judge Pollard ruled that the questions and statements before the Special Grand Jury properly were released, given the invalidation of the old subpoena and the belated voidness of proceedings under it. *Transcript 2, (p. 18).* However, those proceedings were, in fact, clearly not voided, or documentary

evidence of Plaintiff Lankford taken pursuant to these proceedings would have been immediately returned.

At any rate, even if the original subpoena in question is officially void, it does not logically follow that all proceedings of the Special Grand Jury ocurring concurrent with the voided subpoena are void. A Special Grand Jury does not proceed pursuant to a subpoena; a subpoena is issued pursuant to the purposes and designs of the Special Grand Jury. *Va. Code §19.2-208.* While Plaintiffs may have had the right not to testify under the original subpoena, as the original subpoena failed to give adequate notice that testimony would be requested, Plaintiffs waived that right as to any testimony they did, in fact, give. Plaintiffs had not, at that point, been ordered to answer any question put to them by the Special Grand Jury in a court of law. Until so ordered to answer, Plaintiffs answers cannot be characterized as given under compulsion.

Thus, the question, statements and answers still stand as part of the permanent record of the Special Grand Jury. This evidence cannot be struck or suppressed from the record by voiding the subpoena under which it was taken. Likewise, it cannot, and should not, be divulged in a manner clearly repugnant to the law of this Commonwealth. By so divulging this evidence, Plaintiffs have been denied equal protection and due process of law.

A Special Grand Jury, given to activities so permanently injurious and detrimental to Plaintiffs' constitutional rights, must clearly be enjoined from any further proceedings.

Memorandum in Support of Motion for Temporary Restraining Order

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Plaintiffs

Clarence B. Neblett, Jr.
5905 W. Broad Street
Richmond, Virginia 23230
(804) 282-5656
Attorney for Plaintiffs

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND COMPLAINT FOR PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No.

THOMAS FLETCHER CRAIG, JR., et al.,

Plaintiffs

v.

SIDNEY BARNEY, et al.,

Defendants

Plaintiffs herein respectfully submit to this Honorable Court this Memorandum in Support of Motion For Temporary Restraining Order and Complaint For Preliminary Injunction heretofore filed with this Honorable Court.

I.

THIS COURT MAY ENJOIN THE ACTIONS OF A STATE PROSECUTION AND A SPECIAL GRAND JURY, NOTWITHSTANDING PRESENT CRIMINAL PROCESS IN THE STATE PROCEEDING

The doctrine of Younger v. Harris, 401 U.S. 37, precludes interventions by a federal court in an ongoing state criminal prosecution. However, *Younger* does not require a court to abstain in every case where state proceedings have been initiated.

> "If the court concludes that the procedural posture of the state criminal enforcement proceedings which the Plaintiff attacks have not advanced to the point that *Younger* applies (by the time that substantial federal proceedings on the merits of the federal Plaintiff's complaint have transpired), then the court must immediately decide the merits of the federal plaintiff's challenge to the actions of the defendants." *Sovreign News Co. v. Falke*, 448 F. Supp. 306 333 (1977). See *Steffel v. Thompson*, 419 U.S. 922, 930 (1975), *Wooley v. Maynard*, 430 U.S. 705, 711-713 (1977).

Thus, the procedural posture of the state criminal proceeding in question, or the state proceeding itself, must be of such a nature that "principles of equity, comity and federalism" are given "force." *Steffel v. Thompson*, 415 U.S. at 462, *Septum v. Keller*, 614 F. 2d 456, 460 (5th Cir. 1980).

A Grand Jury proceeding's nature is such that principles of comity may require abstention from any federal challenge to its bringing of an indictment against federal plaintiffs. *Sovreign News v. Falke*, 448 F. Supp. at 361.

However, a Special Grand Jury's proceedings do not invoke similar principles of comity. Only where "the state's enforcement activity approaches stages beyond the bare, investigation phase, and . . . the state's judicial institutions commence involvement in the enforcement action, [does the] state's legitimate governmental interest . . . attain sufficient magnitude to merit *Younger's* protection from federal intervention . . . " supra at p. 347. A Special Grand Jury's function is strictly limited to

investigating and making reports thereon concerning any condition which tends to promote criminal activity in the community or which indicates misfeasance of governmental authority. *Va. Code §19.2-191(2)*, referred to by *Va. Code §19.2-206(A) (B)*. While bills of indictment may follow as a result of the report of the Special Grand Jury, they must be prepared by the attorney for the Commonwealth and presented to a regular grand jury. *Va. Code §19.2-214*. Only a regular grand jury has the power to consider bills of indictment. *Va. Code §19.2-191(1)*.

The Special Grand Jury proceeding in question is a state proceeding in the "bare investigation" phase. As such, its proceedings are not afforded protections against federal intervention as embodied in *Younger v. Harris*.

It makes little difference that plaintiffs, on appeal in a state proceeding, may vindicate those constitutional rights which they now present to this court; absent a state enforcement action protected by *Younger*, this Court must intervene on the merits. "Younger principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. §1983 for an alleged deprivation of federal rights." *Wooley v. Maynard*, 430 U.S. at 710. Federal Courts cannot escape their duty to respect a suitor's choice of federal forum for the hearing and decision of his federal constitutional claims "merely because state courts also have the solemn responsibility, equally with the federal courts, to guard, enforce and protect every right granted or secured by the *Constitution of the United States*." *Robb v. Connolly*, 111 U.S. 624, 637 (1884), *Septum v. Keller*, 614 F. 2d at 460-461.

Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

II.

PLAINTIFFS CLAIMS FOR FEDERAL RELIEF SHOULD NOT BE PRECLUDED BY RES JUDICADA OR COLLATERAL ESTOPPEL

The doctrine of res judicada, or collateral estoppel, is briefly stated as thus:

> "A question of fact or legal right, once determined, may not be relitigated even if a later suit between the same parties states a different cause of action. *United States v. Munsingwear*, 340 U.S. 36. The preclusion doctrines will also operate against all claims that *could* have been asserted in the first action. *Johnson v. United States*, 576 F.2d 606, 611 (5th Cir. 1978). A consent judgment, such as that entered in *Sheffner*, may constitute a decision on the merits to which res judicada may attach. 1 B Moore's *Federal Practice* §0.409[5].

Gilbert v. Bagley, 492 F. Supp. 714, 740-741 (M.D. N.C. 1980). In the case at bar, neither questions of fact nor plaintiff's legal rights have been definitely determined to the extent that the preclusion doctrine would apply.

Primarily, while the Honorable Oliver A. Pollard, Jr., Judge of the Circuit Court of Petersburg, Virginia was presented with Plaintiffs' *First, Fourth* and *Fifth* Amendment claims, and may not have been persuaded by them with regard to the production of documents, he refused to *order* that the materials in question be produced as subpoenaed.

Rather, Judge Pollard merely upheld the validity of the subpoenaes. Transcript 2 (p. 10). This "ruling" is not the definitive type ruling that the preclusion doctrines contemplate. The rights in question must be *directly determined* to preclude for Plaintiffs' present claim. *United States v. Mumsingwear, Inc.*, 340 U.S. 36, 38.

Judge Pollard's decision can, at best, be characterized as interlocutory, with a final order pending Plaintiffs' refusal to produce materials on the date subpoenaed. Orders upholding summonses are not appealable as final judgments. *Roger's Adm'r v. Bertha Zinc Co.*, 1 Va. Dec. 827, 19 S.E. 782 (1894). As a general rule, interlocutory decrees are also not appealable. *Thrasher v. Lustig*, 204 Va. 399, 31 S.E. 2d 286 (1963). The preclusion doctrines of res judicada and collateral estoppel are not intended to prejudice the rights of parties "by a decision which in the statutory scheme was only preliminary." *United States v. Munsingwear, Inc.*, 340 U.S. at 40.

Additionally, for preclusion doctrines to apply, "the rights, questions or facts that are the substance of the claim must be distinctly put in issue." *Supra* at 38.

Judge Pollard never, in any hearing, upheld the "scope" of the subpoenaes as being reasonable.

Judge Pollard never considered Plaintiff Lankford's complaint alleging denial of due process by reason of denial of holding magazines and books under an invalidated subpoena. In fact, the substance of this complaint could not have been raised until after Judge Pollard fashioned his inconsistent decrees.

Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

Judge Pollard never ruled on the violation of Plaintiffs' rights to due process and equal protection of law effected by the release of questions and statements given at the Special Grand Jury proceeding, although these facts were made apparent to Judge Pollard by Plaintiffs' counsel.

Judge Pollard never ruled on whether the subpoenaes in question would or would not effect a "chill" on Plaintiffs' *First Amendment* rights although the facts and law substantiating this claim were made apparent to Judge Pollard by Plaintiffs' counsel.

Judge Pollard never considered the substance of Plaintiffs' claim alleging bad faith enforcement of the law.

Given that these claims were either not presented or not definitely ruled on by Judge Pollard, a hearing of Plaintiffs' claim in a federal forum should not be precluded, notwithstanding the prejudicial effect of Judge Pollard's ruling on these as yet unlitigated or undecided claims.

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Plaintiffs

Supplemental Memorandum in Support of Motion for Temporary Restraining Order and Complaint for Preliminary Injunction

---

Clarence B. Neblett, Jr.
5905 W. Broad Street
Richmond, Virginia 23230
(804) 282-5656
Attorney for Plaintiffs

Lawrence Blake, Esq.
Route 106
Prince George, Virginia 23875
(804) 732-3422
Attorney for Plaintiffs

MEMORANDUM PURSUANT TO LOCAL RULE 11(f)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA-RICHMOND DIVISION

CIVIL ACTION FILE NO.
81-0685-R

THOMAS FLETCHER CRAIG, JR. and ORRIN T. LANKFORD, are operators of Adult Book Stores that make available to the adult public, various reading materials, located in the City of Petersburg, Virginia.

This action is brought under First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The Court has jurisdiction under *28 U.S.C. 1331; 28 U.S.C. 1343; 42 U.S.C. 1983; 28 U.S.C. 2201 and 2202; 28 U.S.C. 1343, Subsection 4; 28 U.S.C. 2207; Article 3, Section 2 of the Constitution of the United States and Rule 57 of the Federal Rules of Civil Procedure.*

DEFENDANTS have filed a Motion to Dismiss Amended Complaint, and offer the following reasons why said Motion should be granted by this Court:

I.

THE CONCEPTS OF FEDERALISM AND THE FEDERAL POLICY AGAINST PIECEMEAL REVIEW PRECLUDE THE PLAINTIFFS FROM FEDERAL RELIEF.

While the doctrines of res judicata or collateral estoppel may be inapplicable to the case at bar, the concept of Federalism should preclude any Federal relief for the Plaintiffs at the present time.

Memorandum Pursuant to Local Rule 11(f)

In an action to enjoin a State official from testifying in a State criminal prosecution and State administrative proceeding against a Federal plaintiff, the Supreme Court reversed an injunction granted in the Lower court. *Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385 (1963).* The Plaintiff had been illegally detained, made an incriminating statement and had had evidence from his home seized illegally. The Court in its closing remarks, had this to say:

> The withholding of injunctive relief against this State official does not deprive respondent of the opportunity for Federal correction of any denial of Federal constitutional rights in the state proceedings. To the extent that such rights have been violated, c.f., e.g. *Mapp v. Ohio, supra,* he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claim to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated Federal policy against piecemeal review, at 390.

The Court further stated that "such direct intrusion in state processes does not comport with proper Federal-state relationships" CLEARY at 390. Since Judge Pollard has yet to issue his final order, any Federal equitable intervention would be premature and would violate the Federal policy against piecemeal review. For these reasons, the Plaintiffs claims in a Federal Forum should be precluded.

RESPECTFULLY,

SIDNEY BARNEY,
GREGORY WELSH,

Memorandum Pursuant to Local Rule 11(f)

PHILLIP R. BROOKS
SEYMOUR BATES,
ALVIN SHEFFIELD,
CARLISS A. BATTS,
ESTELLE G. EVANS,
WILLIAM F. McCOY,
ELBERT L. PUGH,

By: Sidney Barney
Counsel

Sidney Barney,
Commonwealth's Attorney,
Courthouse Hill,
Petersburg, Virginia,
23803 =
4588

CERTIFICATE

I hereby certify that I have this 13th day of August, 1981, mailed a copy of the foregoing Memorandum to Burton W. Sandler, Esquire, Suite 600, 28 Allegheny Ave., Towson, Maryland, 21204; Clarence B. Neblett, Jr., Esquire, 5905 W. Broad Street, Richmond, Virginia, 23230, and Lawrence E. Blake, Esquire, Route 106, Prince George, Virginia, 23875.

s/ Sidney Barney
COUNSEL.

Memorandum Pursuant to Local Rule 11(f)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION
NO: 81-0685-R

THOMAS F. CRAIG, JR., et al

v.

SIDNEY BARNEY, et al

O R D E R

In accordance with the memorandum this day filed, defendants' Motion to dismiss the Amended Complaint is GRANTED.

And it is so ORDERED.

s/ D. Dortch Warriner
United States District Judge

Date: 16 September 1981

MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION
NO: 81-0685-R

THOMAS F. CRAIG, JR., et al

v.

SIDNEY BARNEY, et al

On 21 July 1981, plaintiffs filed a Motion for a temporary restraining order enjoining State special grand jury proceedings. A hearing was held on the Motion on 24 July. The Motion was denied. On 6 August, plaintiffs filed an Amended Complaint for a preliminary injunction. Defendants filed a Motion to dismiss on 13 August, and plaintiffs responded on 26 August. No rebuttal was filed, and the Motion is ripe for consideration.

Plaintiffs operate so-called "adult book stores" in Petersburg, Virginia. A State special grand jury was impaneled to investigate alleged prostitution in these bookstores. The foreman of the special grand jury summoned the plaintiffs to appear before the special grand jury and to produce various books and records. Plaintiffs filed in the supervising State court a Motion to quash the subpoenae. At a 22 June 1981 hearing on the Motion to quash, the Honorable Oliver A. Pollard, Jr., of the Circuit Court of the City of Petersburg ruled that plaintiffs could not be compelled to testify under the subpoenae because the subpoenae failed to provide adequate notice. Judge Pollard upheld the validity of the subpoenae insofar as they compelled the production of certain

books and records. At a subsequent hearing on 30 June, plaintiffs were ordered to answer certain questions before the special grand jury, such questions being found not to violate plaintiff's First, Fourth, Fifth and Fourteenth Amendment rights. Plaintiffs then filed their joint Complaint and Motion for relief in this Court.

In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that a federal district court should not intervene in a pending State criminal proceeding. Younger is based on

> the notion of "comity," that is, a proper respect for State functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

In Sovereign News v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), the District Court faced with an almost identical question as is presented to me, ruled that the Younger doctrine requires abstention in an action to interfere by injunction with State grand jury proceedings. The Court reasoned that a grand jury proceeding involves important State interests which evoke the notions of comity and federalism expressed in Younger. While this Court recognizes differences between the grand jury in Falke and the special grand jury here,[1] the differences are not such as would

---

1. Among other things, a Virginia special grand jury cannot hand down an indictment. It may file a report to the court recommending the presentation of its findings to a regular grand jury. Va. Code §§19.2-213 to -214 (1975).

vitiate Younger consideration. The reason for Younger abstention is wholly applicable here. The special grand jury is seeking to ferret out for prospective punishment prostitution in pornography parlors — criminal activity wholly within the appropriate concerns of a State.

Despite such clear applicability, the Younger doctrine is inappropriate if the Complaint adequately alleges bad faith or harassment by the State government. 401 U.S. at 48-49. Plaintiffs here alleges in conclusory terms that the defendants, being the members of the special grand jury, attorney for the Commonwealth for the City of Petersburg, and an assistant Commonwealth's attorney, are using the subpoena mechanism of the special grand jury to harass plaintiffs into closing their stores, thus engaging in bad faith enforcement of the law. The facts alleged do not indicate harassment or bad faith. Indeed, everything done or sought to be done by defendants has been subjected to impartial judicial scrutiny, and it conclusively appears from the Amended Complaint that plaintiffs have had a full and complete opportunity to contest each aspect of the special grand jury action before an impartial tribunal. Ritualistic imprecation of the words "harassment" and "bad faith" will not save an otherwise defective Complaint.

Plaintiffs' claims of a violation of due process are likewise without substance. The Amended Complaint makes clear that, whatever the correctness of the State court's decision, plaintiffs were fully heard by a court with jurisdiction to hear and decide the issues.

A further word; although the defendants were clearly invited by this Court at the 24 July hearing to plead *res judicata*, they did not do so. Indeed, without explanation they conceded that

"the doctrine of *res judicata*. . .may be inapplicable to the case at bar." In the absence of an adversary presentation on this issue, this Court's view is uninformed; but a review of the proceedings before Judge Pollard on 22 June and 30 June shows that he was asked to rule and did rule on the very issues presented to this Court. Counsel for plaintiffs here acknowledged as much in his argument. Plaintiffs, claiming some procedural bar to an appeal to the Virginia Supreme Court, have in effect appealed Judge Pollard's ruling to this Court. This Court has no appellate jurisdiction from the Circuit Courts of the Commonwealth.

The Motion to dismiss the Amended Complaint will be GRANTED and an appropriate order shall issue.

s/ D. Dortch Warriner
United States District Judge

Date: 16 September 1981

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

* * *

[54]THE COURT: Gentlemen, just to resume, to give in a resume form what I feel about this situation, ruling or whatever, it is my opinion the subpoena was properly issued by the foreman of the Grand Jury, and I cite 19.2-208, Davis v. Commonwealth. As to whether the subpoena called for testimony by a witness, I have some reservation about that. In Rule 3(A):15 I believe it is required that the subpoena specifically state that the witness was called upon to testify. For the purposes of going beyond this, it is a simple matter for the State to have new subpoenas issued. We can go on to discuss the questions or not, or if it is opposed by counsel for the petitioner I think that would have to be postponed. In my opinion the subpoena for the documents involved is valid and stands at this point.

As I just alluded to, I think it is insufficient to require the witnesses to testify, but where this leaves us I don't know since apparently they didn't testify anyway.

MR. SANDLER: There was some testimony.

THE COURT: Did anybody testify?

MR. SANDLER: Yes, sir, there was some testimony.

THE COURT: By your client?

[58] witnesses will relate to the individual copies of the books—if the motions and delays that have been necessitated by these hearings and the memorandums, and so forth—if that has delayed the Grand Jurors' questioning individual witnesses relating to individual issues, then there is no problem because— See what I'm saying?

MR. SANDLER: Yes, sir.

THE COURT: I don't know if that is the case.

MR. SANDLER: At this point we are not prepared to discuss that.

THE COURT: That is what I'm saying.

MR. SANDLER: Yes, sir. Do I understand you are of the opinion, Your Honor, with your permission, that the request for production of unspecified copies, just one copy of everything in the store, is proper under the subpoena?

THE COURT: I think it is proper as long as it is not held for an unreasonable period of time.

MR. SANDLER: Okay.

THE COURT: Unless it is some showing from beyond a certain point they are related to the Grand Jury proceedings and questioning of witnesses—

MR. SANDLER: You haven't made a final ruling. . . .

[12] application the subpoena was issued.

Now, Your Honor, Section (b) deals with the subpoenas for production of documentary evidence and objects, and that goes on to say a subpoena when authorized by a Court order may also command the person summoned thereby to produce writings or objects described in the subpoena, and it goes on further to talk about notice and hearing.

Excerpts of Transcript of Proceedings

Your Honor, the subpoena in this particular matter before the Court was directed to Thomas Fletcher Craig, Jr., and the other petitioner Lankford, or designated manager. It is not directed to an officer of the corporation. It is not directed to a resident or registered agent. It is directed towards an individual and/or manager, obviously of some business establishment. It does not anywhere on its face imply or indicate that it's directed toward a corporate officer or custodian of records of the corporation, and I respectfully submit that the subpoena on its face does not deal with a corporate entity or corporate individuals, but with an individual or a designated manager. It's in the disjunctive, Your Honor, and not in the conjunctive. Nevertheless, Your Honor, the subpoena is signed by the foreman of a Special Grand Jury, and it directs the. . . .

[18]MR. SANDLER: The contents of the transcript of the Special Grand Jury is not supposed to be divulged by anyone until it has completed its investigation and sealed, and it is supposed to be submitted to the Court in a sealed fashion.

THE COURT: I have ruled, have I not, that the subpoena was invalid. Therefore, the questions in the proceedings before the Grand Jury pursuant to that invalid subpoena are therefore now void to an extent. Therefore, I don't think I'm divulging anything, and I'm handling this on a matter to save you time and me time, as long as everybody in here is in here connected with this Grand Jury proceeding, with the exception of Mr. Parrish, the Clerk, and Mr. Dunn. And I can ask them to step out.

MR. SANDLER: I have the greatest respect for your ruling.

THE COURT: I don't want to waste your time and everybody's time.

Excerpts of Transcript of Proceedings

Ask Mr. Craig the question. I refuse to answer it. Get Judge Pollard. Go back—

MR. SANDLER: I agree.

THE COURT: I think it is an exercise in futility. I agree with you technically but practically I. . . .

[10]THE COURT: The Court hasn't ordered any production of documents. The Court has sustained the validity of the subpoena issued by the Special Grand Jury. There is a difference.

MR. SANDLER: Fine. I just wanted to have a line of communication with the Court. Thank you, Your Honor.

THE COURT: Do we have anything else or do you want to go through these questions? Quite frankly, I think the ruling on them is pretty obvious. I think they are entitled to the Fifth Amendment if you want on quite a few of them. Some should be answered. Assuming the subpoena will be issued, we have to go on the assumption rather than have you back down here every two or three days. We are trying to do it this way to save time.

MR. WELSH: Judge, the subpoena should be ready now. If you would like, it may help—

THE COURT: You see, the terms of the subpoena, Mr. Welsh, insofar as personal appearance to testify shouldn't be any problem.

MR. WELSH: The only way the subpoena differs from the original subpoena is that it says to testify and to produce, and of course in Mr. Lankford's case it leaves out paragraph (D) since he had already complied. . . .

• • •

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment — United States Constitution

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fifth Amendment — United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Section I, Fourteenth Amendment — United States Constitution

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Fourth Amendment — United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. Code of Virginia

"§19.2-207. Composition of a special grand jury.—Special grand juries shall consist of not less than seven and not more than eleven members, and shall be summoned from a list prepared by the court. Members of a special grand jury shall possess the same qualifications as those prescribed for members of a regular grand jury. The court shall appoint one of the members as foreman. (1975, c. 495.)

§19.2-208. Subpoena power of special grand jury.—The special grand jury may subpoena persons to appear before it to testify and to produce specified records, papers and documents, but before any witness testifies, he shall be warned

by the foreman that he need not answer any questions or produce any evidence that would tend to incriminate him, and that the witness may have counsel of his own procurement present when he appears to testify, and at the same time the foreman also shall warn each witness that he may later be called upon to testify in any case that might grow out of the investigation and report of the special grand jury. Notwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable.

The foreman shall administer the oath prescribed by law for witnesses, and any member of the special grand jury may examine a witness. (1975, c. 495.)

§19.2-212. Provision for court reporter; use and disposition of notes, tapes and transcriptions.—A court reporter shall be provided for a special grand jury to record, manually or electronically, and transcribe all oral testimony taken before a special grand jury, but such reporter shall not be present during any stage of its deliberations. The notes, tapes and transcriptions of the reporter are for the sole use of the special grand jury, and the contents thereof shall not be divulged by anyone except as hereinafter provided. After the special grand jury has completed its use of the said notes, tapes and transcriptions, the foreman shall cause them to be sealed, the container dated, and delivered to the courts.

The court shall cause the sealed container to be kept safely. If any witness testifying before the special grand jury is prosecuted subsequently for perjury the court, on motion of either the attorney for the Commonwealth or the defendant, shall permit them both to have access to the testimony given by the defendant when a witness before the special grand jury, and the said testimony shall be admissible in the perjury case.

If no prosecution for perjury is instituted within three years from the date of the report of the special grand jury, the court shall cause the sealed container to be destroyed. (1975, c. 495.)

§19.2-213. Report by special grand jury.—At the conclusion of its investigation and deliberation, the special grand jury shall file a report of its findings with the court, including therein any recommendations that it may deem appropriate, after which it shall be discharged. (1975, c. 495.)

§19.2-214. Prosecutions resulting from report.—Any bill of indictment for alleged criminal offenses, which may follow as a result of the report of the special grand jury, shall be prepared by the attorney for the Commonwealth for presentation to a regular grand jury. (1975, c. 495.)"